

Vol 31

Office - Supreme Court, U. S.

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JUN 20 1940

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. **172** ✓
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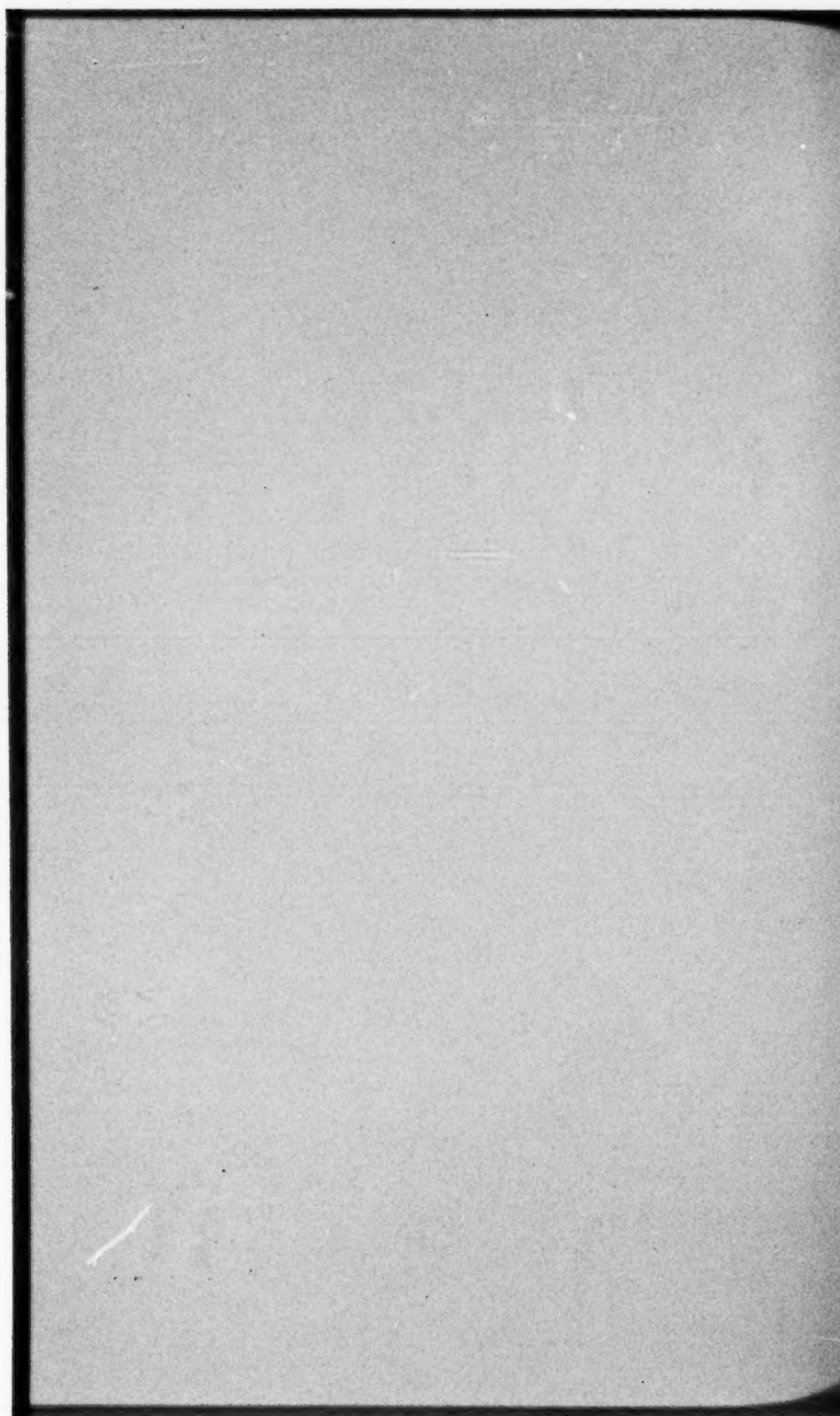
**I. H. NAKDIMEN, H. S. NAKDIMEN, A. F. HOGE,
AND GUS KRONE, PETITIONERS,**

VS.

LAZARE BAKER, RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE CIR-
CUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT AND BRIEF IN SUPPORT
THEREOF.**

**JAMES B. McDONOUGH,
G. O. PATTERSON,
EDWARD H. PATTERSON,**
Counsel for Petitioners.



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No.

I. H. NAKDIMEN, H. S. NAKDIMEN, A. F. HOGE,
AND GUS KRONE, PETITIONERS,

VS.

LAZARE BAKER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MAY IT PLEASE THE COURT:

Petitioner I. H. Nakdimen, defendant in the District Court of the United States for the Western District of Arkansas, Fort Smith Division, and appellant in the Court of Appeals for the Eighth Circuit in causes Nos. 11190 and 11612 in said court, and also petitioners H. S. Nakdimen, A. F. Hoge and Gus Krone, sureties on the supersedeas

NOTE: There were two appeals from the District Court to the Court of Appeals for the Eighth Circuit. The record in the first appeal is numbered 11190, which we have designated as first record; and in the second appeal 11612, which we have designated as second record. References will be made to these records by "first R. 2," in parenthesis, which means case 11190 and on page 2 thereof. The second appeal will be designated as "second R. 2," which means case 11612 and on page 2 thereof.

bond of I. H. Nakdimen in his appeal from said District Court of the United States to the Court of Appeals for the Eighth Circuit, and who join I. H. Nakdimen as petitioners in his petition for certiorari so that there will be no defect of parties in this cause before the Supreme Court of the United States, respectfully show to this Honorable Court:

A.

**SUMMARY AND SHORT STATEMENT OF THE
MATTER INVOLVED.**

This litigation grows out of an oral contract for the purchase and sale of 200 shares of the capital stock of the City National Company, an Arkansas corporation. On December 6, 1935, in Fort Smith, Arkansas, the respondent, Lazare Baker, who was secretary-treasurer of the City National Company, and had been such from its organization, and of which corporation the petitioner, I. H. Nakdimen was president, and said I. H. Nakdimen entered into an oral contract for the purchase and sale of 200 shares of the capital stock of said corporation; Baker agreeing to sell said shares to I. H. Nakdimen and transfer said shares to Celia Nakdimen, wife of I. H. Nakdimen, at the latter's request, and said Baker also agreeing to receive in payment for said shares the non-negotiable promissory note of I. H. Nakdimen for the sum of \$13,125.00 due in three years after date, without interest, note payable to Lazare Baker at the City National Bank of Fort Smith, Arkansas, with the right in I. H. Nakdimen, upon receiving sixty days' notice of the maturity of said note, to extend the date of payment for a period of two additional years, and in the event of the extension of said note the amount to be paid at the end

of five years was \$13,700.00; and said Baker also to receive the certificate of stock issued to Celia Nakdimen for 200 shares as security for the payment of said note of I. H. Nakdimen, said certificate of stock to be duly endorsed by Celia Nakdimen, and said Baker also to receive the written consent of Celia Nakdimen that said certificate should be so pledged.

The note, which states substantially the terms of the contract, is in this record (first R. 60, 61), and is also found in the last opinion of the Court of Appeals for the Eighth Circuit (second R. 42). The said note, however, does not contain any provision fixing the time when said note and the other documents were to be delivered. The contract of purchase and sale was made between said parties in a conference lasting nearly a whole day (first R. 44, 46) between Baker and his attorney, Emmett Carter, whom Baker had brought from St. Louis, Missouri, to aid him in the sale, on the one side, and I. H. Nakdimen and his son, H. S. Nakdimen, cashier of the bank, on the other. According to Baker, the agreement was reached about four o'clock in the afternoon of said December 6, 1935. After said contract was agreed to, Baker cancelled and surrendered his old certificate of stock (first R. 44), and at the same time issued a new certificate for 200 shares to Celia Nakdimen. The note and the certificate and all other papers that were to be signed by Baker and Nakdimen were signed at the bank at that conference during that afternoon. Celia Nakdimen was not in the conference at the bank, and since Baker's attorney required her signature to the consent and the endorsement of the stock certificate (first R. 68), it was necessary that the papers to be signed by Celia Nakdimen should be taken to the home of I. H.

Nakdimen and his wife. I. H. Nakdimen (first R. 68) volunteered or suggested that he would take the consent and the certificate home for his wife to sign. All the documents were dated that day—December 6, 1935 (first R. 59, 61). Baker himself presented to I. H. Nakdimen (first R. 51) the new certificate of stock for Nakdimen's signature.

“Plaintiff Baker was present when the note was being written up and signed” (first R. 68 and 44). “Everything was agreed to by Mr. Baker and was agreeable to him and his attorney (first R. 68) until said attorney suddenly and without warning, and as they were about to leave the bank, drew out a photostatic copy of a note payable to I. H. Nakdimen for \$20,300.00 and dated in 1921, bearing interest at 8% and past due more than fifteen years, and asked Mr. Nakdimen what he intended to do about that.” That note had not been mentioned during the entire preceding conference. Afterwards the Circuit Court of Appeals for the Eighth Circuit denied a recovery on that note (97 Fed. (2d) 715). I. H. Nakdimen had for some time been in poor health and was shocked at the production of that note by Baker's attorney (first R. 61) and walked away from said attorney, saying nothing at that time. In a short time, and before Baker and Carter left the bank, I. H. Nakdimen came back into the bank office and Carter again asked him what he was going to do about said note (first R. 68). After Carter brought that matter out, I. H. Nakdimen “said he thought that both deals should be settled at the same time” (first R. 68). There is no evidence to show that either Baker or Carter made any objection or response to that suggestion of I. H. Nakdimen. At that point, this appears in said record:

"Q. Then what did Mr. Carter do after that?

"A. Well, he left the bank with Mr. Baker. I presume he went back to St. Louis" (first R. 68, 69).

The departure of Baker and his attorney ended the conference.

Baker testified (first R. 44) that I. H. Nakdimen said in the conference that he would take the consent and the note home for his wife to sign the certificate and the consent and would deliver them the next morning; and that (first R. 51) he and I. H. Nakdimen signed the new certificate of stock and "that was put with the note." The evidence of H. S. Nakdimen (first R. 69) showed the consent and the certificate were taken to the home of Celia and I. H. Nakdimen and were signed by her that night at home, and that was after the unpleasantness which had arisen over the other note. There is no evidence to show whether the note, at the time that the certificate was placed with it, was in the possession of Baker or in the possession of I. H. Nakdimen. H. S. Nakdimen was asked (first R. 67) "what was the understanding as to when the *stock certificate* should be returned." He answered, "It was to be delivered the next day."

The District Court (second R. 23) found that Nakdimen "after he had received the requested information," and on February 3, 1936, refused to deliver the note and the other documents. On that point the Court of Appeals in its last opinion (second R. 43) found that "Baker undertook to *procure the requested information and failed.*" Neither finding is supported by any evidence. Baker testified that he (first R. 46) "did obtain for Mr. Nakdimen the information which he requested." He was

then asked the time he received that information and delivered it to Nakdimen. He answered, "I got a copy of Mr. Carter's letter to Mr. Nakdimen dated January 14," *but he never stated when he delivered the information to Nakdimen.*

Plaintiff Baker in his evidence admits in substance and effect that on the morning of December 7, 1935, he went to the bank and his office, and cleared out his desk of the personal articles therein, and then went downstairs "and asked Mr. Nakdimen if he had the consent *signed* and the note *ready* to deliver, and he said he had changed his mind about signing that note until another claim against him was settled" (first R. 44). After some argument between I. H. Nakdimen and Lazare Baker, the latter said "and Mr. Nakdimen then asked witness (Baker) for certain documents concerning the other note. He said he would have to have those *delivered first.*" Baker then wired his attorney, Carter, in St. Louis, and wrote his father-in-law, Sommer, asking that the documents requested by Nakdimen be furnished him (first R. 44, 45). Baker's evidence shows, as above indicated, that he obtained the information (first R. 46); but it does not show when he delivered same to I. H. Nakdimen if at all. It is believed that said information, if it was delivered, was delivered after February 3 and on or before February 9, 1936.

The District Judge asked Baker if Nakdimen made an absolute refusal. Baker answered (first R. 45), "He just said he decided he would not *sign* the note until I got this information for him." Baker several times refers to the so-called refusal of Nakdimen to deliver the note, but in every instance he connects it with the qualification either that Nakdimen wanted that information

first or that Nakdimen wanted the two cases settled together. The language of Baker at one time (first R. 46) was that Nakdimen "thought I could bring pressure to bear on that." That remark referred to the settlement of the other claim. In every instance when Baker speaks of Nakdimen's refusal, said refusal is qualified in the way above indicated. Baker owned one claim and the other was the claim of his grandmother's estate.

Another fact shows the waiver by Baker of the time of delivery, which waiver took place on December 7, 1935. It is undisputed that Baker purchased 200 shares of stock in the company with the understanding that he would become secretary-treasurer. His preparations to leave Fort Smith at once on or about December 7, together with the condition upon which he purchased originally, indicates that he would retire from the office which he held in the company upon the sale of his stock. It is undisputed that the agreed price (first R. 51) was arrived at by deducting from the \$20,000.00 the amount paid by the company to Baker as salary up to December 6, 1935. The deduction was his salary up to that date. *Hence all salary he received after that date was his own, and was a consideration to him for the delay.* Baker did not resign then. By not resigning, he received the salary up to February 21, 1936 (first R. 43). He remained with the company, *drawing his salary*, until February 21, 1936 (first R. 43). He left Fort Smith (first R. 42) in March —after he had assumed the contract was still in force, and after he had demanded performance of Nakdimen on February 3, 1936, and after Nakdimen had tendered full performance on February 9, 1936, and after his refusal to accept the documents on that date. He had lived in Fort Smith from March, 1931, to March, 1936. His

resignation, as above shown, was on February 21, 1936. Apparently H. S. Nakdimen (first R. 68) confirming the fact that Baker waived the delivery on December 7, when asked as to the understanding when the *stock certificate* should be returned, answered (first R. 68): "It was to be delivered the next day. Lazare was not leaving town that day or the next," indicating by fair inference that a delivery any time before Baker left town would be satisfactory.

It is undisputed that on February 3, 1936, Baker offered full performance and demanded full performance of I. H. Nakdimen (first R. 45, 46). It is also undisputed that on February 9, 1936, Nakdimen offered all the documents, offering full and complete performance of the contract. Baker refused to accept the note and the other documents on the ground that Nakdimen should pay his traveling expenses and attorney's fees (first R. 45), and not on the ground of delay, or that it was too late. On cross examination Baker stated that the traveling expenses to St. Louis were "not part of the expense witness requested Nakdimen to make up" (first R. 47). Apparently the Court of Appeals in its opinion (second R. 43) treats the whole of the expense as being demanded by Baker, although Baker did not so testify, and did not specify the amount of his traveling expense that he wanted, nor what business he was traveling on at the time, nor did he at any time make any statement as to the amount of the attorney's fee nor the traveling expenses. He claimed that he had employed a local attorney, although he does not refer to him at the time as a "local attorney," between February 3, 1936, and February 9, 1936, but he did not bring his suit until nearly eleven months thereafter, which was brought October 27, 1936.

I. H. Nakdimen (first R. 62) and H. S. Nakdimen both testified that the documents were tendered to Baker on December 7 and he was told a number of times that the documents were his. H. S. Nakdimen testified that the documents were held as the property of Baker as he had refused to receive same (first R. 72), and they were tendered to Baker repeatedly (first R. 70, 71, 72, 74).

The petitioners are not requesting the court to pass on issues of fact. The controlling facts are not in dispute. The only conflict in the evidence of Baker and the Nakdimens relates to the offer of delivery of the documents on December 7, 1935, and repeatedly thereafter. The errors of which the petitioners complain are errors of law, based in part upon an erroneous view of the law and to some extent an erroneous view of the facts.

By stipulation the evidence in the printed record on the first appeal, No. 11190, is the evidence on the second appeal (second R. 35), 11612.

A BRIEF SUGGESTION AS TO THE PLEADINGS.

The respondent brought his conversion suit, a tort suit pure and simple, on October 27, 1936, against I. H. Nakdimen and Celia Nakdimen, praying for a judgment against each of them in the sum of \$13,125.00 and interest. After that case had long been at issue awaiting trial, Baker filed a new complaint, called an "amended petition," which was filed on September 10, 1937 (first R. 2). The only additions to, and changes in, the old complaint are shown in defendant's motion to strike (first R. 14) directed to the amended petition. Those additions were as follows:

"Plaintiff further states that plaintiff has, as aforesaid, performed his part of said agreement, and defendants have received the benefit thereof and have converted said property to their and each of their own use."

And also:

"Plaintiff further states that the conduct of said I. H. Nakdimen and of his wife was wrongful, willful, deceitful and fraudulent and was intentionally committed."

And also:

"and prays further punitive damages against said defendants, I. H. Nakdimen and Celia Nakdimen, his wife, in the sum of \$10,000.00."

At the conclusion of the evidence at that trial, Baker dismissed as to Celia Nakdimen (first R. 82).

That conversion suit was tried by the court and a jury. The court instructed the jury in substance (first R. 86) that if they found there was conversion they would find for the plaintiff in the sum of \$13,125.00 and certain interest, and further (first R. 86): "On the other hand, if you find for the defendant, *the result is that the note and the obligations in the case, the stock—I mean the note obligation and the stock, having been tendered into court here, will be for the plaintiff to accept. In other words, if you find for the plaintiff, you pay them (him) \$13,125.00. If you find for the defendant, then they (he) follow the terms of the contract and agreement and accept the note of \$13,125.00.*" The court then told the jury that even if they found for the defendant, the de-

fendant would still owe the plaintiff the amount of the note.

The Court of Appeals on the first appeal held that the case was controlled by the case of *Grist v. Lee*, 124 Ark. 206. That case in its facts was identical with this case, and in that case the Supreme Court of Arkansas reversed *and dismissed the case*, holding that after a conversion suit had been lost, *the plaintiff could not convert his suit into one for damages for breach of contract*. The petitioner contends that the conversion suit was in conflict with a suit for damages, and hence the latter could not be maintained. The petitioner also contends that when the respondent demanded performance of the contract of Nakdimen on February 3, 1936, he waived any breach by Nakdimen, if there was one. The other questions are more fully stated in the statement of the reasons for the writ.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals for the Eighth Circuit has decided important questions of local law in a way probably in conflict with applicable local decisions of the Supreme Court of Arkansas, which questions are as follows:

1. Under the laws of Arkansas and the decisions of the Supreme Court of that state, when the respondent brought his conversion suit and the same was decided

against him, he cannot amend his complaint so as to make it a suit for damages for breach of contract, and therefore the "Second Amended Petition" should have been dismissed on the first appeal, and the same question arises on the second appeal. The federal courts decided in conflict with the Arkansas law that the complaint could be so amended.

2. Under Arkansas laws and decisions, when respondent brought a conversion suit, which is a suit in tort, said respondent cannot be permitted to convert said suit by amending into a suit asking damages for breach of contract, since the conversion suit and the suit for breach of contract are contradictory and conflicting.

3. Under the laws of Arkansas, a litigant cannot occupy conflicting positions in seeking relief for claimed wrongs. The respondent attempts to do that in bringing a conversion suit and then attempting to convert the same into a suit for damages for breach of contract.

4. Under the laws of Arkansas, a contract is not breached unless there is an absolute and unqualified refusal to perform. The language used by Nakdimen as given by Baker does not constitute an absolute and unqualified refusal to perform.

5. Under the laws of Arkansas, if Nakdimen failed to tender a delivery of the note and other documents on December 7, 1935, Baker had the right to waive delivery on that day by consenting and acquiescing in the delay requested by Nakdimen. Baker by his own evidence, and

by the benefit which he derived by drawing his salary until February 21, 1936, did waive delivery on December 7, 1935.

6. Under the laws of Arkansas, when Baker on February 3, 1936, offered performance and demanded performance on the part of Nakdimen, he treated the contract as existing and alive for both himself and Nakdimen, and he thereby waived any previous breach by Nakdimen, if there was one.

7. Under the laws of Arkansas, a court of law has no jurisdiction to enforce specific performance. When Baker on February 3, 1936, demanded performance by Nakdimen and fixed no time within which Nakdimen should perform, the law gave Nakdimen the right to perform within a reasonable time. Baker, by his offer and demand of February 3, 1936, waived the previous breach by Nakdimen, if there was one, and kept the contract alive, and Nakdimen therefore had the right to offer performance on February 9, 1936, and Baker breached the contract by refusing to receive the note and the other documents on that day. Nakdimen was therefore entitled to a decree for specific performance.

8. Under the laws of Arkansas and the facts in this case, there was no breach of the contract by Nakdimen on December 7, 1935.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals

for the Eighth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket, Nos. 11190 and 11612, I. H. Nakdimen, appellant, vs. Lazare Baker, appellee, and that said judgment in favor of the appellee may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

I. H. Nakdimen,
H. S. Nakdimen,
A. F. Hoge,
Gus Krone,

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